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*University of Richmond*, [jeisen@richmond.edu](mailto:jeisen@richmond.edu)

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# Federal Administrative Dispute Resolution Deskbook

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Marshall J. Breger, editor  
Gerald S. Schatz and  
Deborah Schick Laufer, co-editors



Section of Administrative Law  
and Regulatory Practice



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## Chapter 13

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### ADR at the Environmental Protection Agency

*by Joel B. Eisen*

#### I. Introduction

This chapter examines how the U.S. Environmental Protection Agency (EPA) uses alternative dispute resolution (ADR) methods to help resolve complex environmental disputes. In recent years, the EPA's use of ADR has increased dramatically in a wide variety of settings.<sup>1</sup> The EPA has made ADR a central feature of its environmental enforcement strategy, encouraged its use in Title VI and environmental justice conflict settings, and turned to negotiated rulemaking as an alternative to the cumbersome notice-and-comment process for the development of new federal regulations.<sup>2</sup> Other EPA programs, such as the Brownfields Economic Redevelopment Initiative, promote nonadversarial methods for tackling complex environmental problems.<sup>3</sup> This chapter focuses on environmental enforcement actions, where the EPA has made considerable progress toward a goal of making ADR a regular part of its enforcement strategy.

It is the EPA's official policy to consider ADR whenever it may result in a quicker, more efficient resolution of an enforcement action. The EPA has used ADR in civil enforcement actions initiated under seven major federal environmental statutes: the Clean Air Act (CAA); the Clean Water Act (CWA); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, popularly known as Superfund); the Emergency Planning & Community Right-To-Know Act (EPCRA); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Resource Conservation Recovery Act (RCRA); and the Toxic Substances



Control Act (TSCA).<sup>4</sup> While the EPA has utilized several types of ADR, including convening, minitrials, and mediation, it most often employs mediation for resolution of enforcement cases. Mediation proceedings have varied widely in their scope and complexity; the EPA has used mediation in cases with as few as two parties and as many as 1,200 participants.

This chapter begins with a brief introduction to environmental ADR, including a description of the major ADR mechanisms, the advantages and disadvantages of using ADR to resolve environmental disputes, and the history of ADR's use in environmental disputes. It continues with an explanation of the growth of environmental enforcement ADR, including a summary of the statutes and policies encouraging the EPA to use ADR. Next it examines specific uses of ADR in enforcement cases, concentrating on the role of mediation in resolving CERCLA disputes. The chapter closes with a section that will be of particular interest to counsel for litigants in environmental cases: an ADR "road map" that summarizes the process from start to finish, from the EPA's decision to use ADR, to selection of an appropriate third-party neutral, to resolution of the dispute.

## II. Environmental ADR

The types of ADR in environmental disputes include any techniques that parties employ to attempt to resolve their disputes voluntarily through the involvement of third-party neutrals. These include the following forms as well as lesser-known forms and variations and hybrids (for example, med-arb):

- *Mediation*, which is the dominant ADR method used in environmental enforcement disputes, involves a neutral third party (the mediator) who helps the parties reach an agreement to resolve their dispute, whether or not they in fact do so. Usually the parties voluntarily enter into mediation and choose the mediator. The